

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

VICTOR MACKENZIE,  
Inmate Booking No. 10757616

Plaintiff,

vs.

ROBERT J. STALL; MICHAEL  
BEGOVICH; ANN SUMMERS,

Defendants.

Civil No. 11cv1046 IEG (MDD)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE AND GARNISHING  
\$350.00 BALANCE FROM  
PRISONER TRUST ACCOUNT  
[ECF No. 2]; and**

**(2) DISMISSING ACTION FOR  
FAILING TO STATE A CLAIM  
PURSUANT TO 28 U.S.C.  
§§ 1915(e)(2)(B) & 1915A(b)**

Plaintiff, an inmate currently detained at the San Diego Central Jail located in San Diego, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF No. 2].

**I. MOTION TO PROCEED IFP**

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28

1 U.S.C. § 1914(a). An action may proceed despite a party's failure to pay only if the party is  
 2 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493  
 3 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).  
 4 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in  
 5 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28  
 6 U.S.C. § 1915(b)(1) & (2). The Court finds that Plaintiff has submitted a certified copy of his  
 7 trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's  
 8 trust account statement shows that he has insufficient funds from which to pay an initial partial  
 9 filing fee.

10 Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 2] and  
 11 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further  
 12 orders the Watch Commander at the San Diego Central Jail or his designee to garnish the entire  
 13 \$350 balance of the filing fees owed in this case, collect and forward them to the Clerk of the  
 14 Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## 15 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

16 The Prison Litigation Reform Act ("PLRA")'s amendments to 28 U.S.C. § 1915 also  
 17 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like  
 18 Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or  
 19 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,  
 20 probation, pretrial release, or diversionary program," "as soon as practicable after docketing."  
 21 *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua  
 22 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,  
 23 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
 24 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-  
 25 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.  
 26 2000) (§ 1915A).

27 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
 28 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28

1 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner's suit  
2 make and rule on its own motion to dismiss before directing that the Complaint be served by the  
3 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits,  
4 but requires a district court to dismiss an in forma pauperis complaint that fails to state a  
5 claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing  
6 § 1915A).

7 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
8 allegations of material fact and must construe those facts in the light most favorable to the  
9 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
10 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

11 In this matter, Plaintiff seeks to hold the attorneys appointed to represent him in his  
12 criminal matter liable for alleged constitutional violations. (*See* Compl. at 3-11.) However, a  
13 person “acts under color of state law [for purposes of § 1983] only when exercising power  
14 ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with  
15 the authority of state law.’” *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting  
16 *United States v. Classic*, 313 U.S. 299, 326 (1941)). Attorneys appointed to represent a criminal  
17 defendant during trial, do not generally act under color of state law because representing a client  
18 “is essentially a private function ... for which state office and authority are not needed.” *Polk*  
19 *County*, 454 U.S. at 319; *United States v. De Gross*, 960 F.2d 1433, 1442 n.12 (9th Cir. 1992).  
20 Thus, when publicly appointed counsel are performing as advocates, *i.e.*, meeting with clients,  
21 investigating possible defenses, presenting evidence at trial and arguing to the jury, they do not  
22 act under color of state law for section 1983 purposes. *See Georgia v. McCollum*, 505 U.S. 42,  
23 53 (1992); *Polk County*, 454 U.S. at 320-25; *Miranda v. Clark County*, 319 F.3d 465, 468 (9th  
24 Cir. 2003) (en banc).

25 Accordingly, Plaintiff's claims against Defendants must be dismissed for failing to state  
26 a claim upon which section 1983 relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii) &  
27 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

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Moreover, to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 based on the alleged ineffectiveness assistance of his trial counsel, his claim amounts to an attack on the validity of his underlying criminal proceedings, and as such, is not cognizable under 42 U.S.C. § 1983 unless and until he can show that conviction has already been invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir. 2003) (“Absent such a showing, [e]ven a prisoner who has fully exhausted available state remedies has no cause of action under § 1983....”) (quoting *Heck*, 512 U.S. at 489), *cert. denied*, 124 S. Ct. 2388 (2004). *Heck* holds that “in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. A claim challenging the legality of a conviction or sentence that has not been so invalidated is not cognizable under § 1983. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

In *Heck*, the Supreme Court held that:

when a state prisoner seeks damages in a section 1983 suit, the district court must consider *whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence*; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

*Heck*, 512 U.S. at 487 (emphasis added). An action that is barred by *Heck* should be dismissed for failure to state a claim without prejudice to Plaintiff’s right to file a new action if he succeeds in invalidating his conviction. *Edwards*, 520 U.S. at 649.

Here, Plaintiff’s ineffective assistance of counsel claims against Defendants “necessarily imply the invalidity” of his criminal proceedings and continuing incarceration. *Heck*, 512 U.S. at 487. Were Plaintiff to succeed in showing that Defendants rendered ineffective assistance of counsel, an award of damages would “necessarily imply the invalidity” of his conviction. *Id.*;

1 *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) (to succeed on ineffective  
 2 assistance claim petitioner must show that counsel's performance fell below objective standard  
 3 of reasonableness and that but for counsel's errors the result of the trial would have been  
 4 different); *Lozada v. Deeds*, 964 F.2d 956, 958-59 (9th Cir. 1992) (remedy for ineffective  
 5 assistance of counsel is a conditional writ granting petitioner's release unless state retries him  
 6 or allows him to pursue an appeal with the assistance of counsel within a reasonable time).  
 7 Thus, because Plaintiff seeks damages for an allegedly unconstitutional criminal proceedings  
 8 in a criminal case, and because he has not alleged that his conviction has already been  
 9 invalidated, a section 1983 claim for damages has not yet accrued. *See Heck*, 512 U.S. at 489-  
 10 90.

11 Accordingly, the Court finds that Plaintiff's entire Complaint must be dismissed sua  
 12 sponte for failing to state a claim upon which relief could be granted pursuant to 28 U.S.C.  
 13 §§ 1915(e)(2)(B) and 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1.

### 14 **III. CONCLUSION AND ORDER**

15 Good cause appearing, **IT IS HEREBY ORDERED:**

16 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is  
 17 **GRANTED.**

18 2. The Watch Commander for the San Diego Central Jail, or his designee, shall  
 19 collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in this case  
 20 by collecting monthly payments from the account in an amount equal to twenty percent (20%)  
 21 of the preceding month's income and forward payments to the Clerk of the Court each time the  
 22 amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL  
 23 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER  
 24 ASSIGNED TO THIS ACTION.

25 3. The Clerk of the Court is directed to serve a copy of this Order on Watch  
 26 Commander, San Diego Central Jail, 1173 Front Street, San Diego, CA 92101.

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1           **IT IS FURTHER ORDERED** that:

2           4.       Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which relief  
3 could be granted. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). However, Plaintiff is  
4 **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a First  
5 Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's  
6 Amended Complaint must be complete in itself without reference to the superseded pleading.  
7 *See* S.D.CAL. CIVLR. 15.1. Defendants not named and all claims not re-alleged in the Amended  
8 Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.  
9 1987).

10           Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief  
11 may be granted, it may be dismissed without further leave to amend and may hereafter be  
12 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79  
13 (9th Cir. 1996).

14           5.       The Clerk of the Court is directed to mail a form civil rights Complaint to Plaintiff.

15  
16 DATED: 6/30/11

  
17 **HON. IRMA E. GONZALEZ**, Chief Judge  
18 United States District Court  
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